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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re GABRIEL B., a Person Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

JAMES B.,

Defendant and Appellant.

D075451

(Super. Ct. No. EJ4203)

APPEAL from an order and judgment of the Superior Court of San Diego County,
Gary M. Bubis, Judge. Affirmed.

William D. Caldwell, under appointment by the Court of Appeal, for Defendant
and Appellant.

Thomas E. Montgomery, County Counsel, Caitlin E. Rae, Chief Deputy County
Counsel, and Lisa Maldonado, Deputy County Counsel, for Plaintiff and Respondent.

James B. (Father) appeals from an order of the juvenile court denying his Welfare and Institutions Code section 388¹ petition and terminating his parental rights as to his biological child, Gabriel B. (Gabriel). Father contends the juvenile court erred by denying his section 388 petition without permitting an evidentiary hearing. We agree with the trial court's finding Father did not make a prima facie showing that his requested change in orders would be in Gabriel's best interests and, therefore, affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

Gabriel tested positive for amphetamine at birth. His mother (Mother) had been diagnosed with schizoaffective disorder and was unstable. Mother had several outbursts at the hospital and left Gabriel unattended. As a result, the hospital limited Mother to supervised visits with Gabriel. Mother discharged herself and told hospital staff they could keep the baby.

Mother identified Father as Gabriel's biological father and the San Diego Health and Human Services Agency (the Agency) interviewed him a couple of days after Gabriel's birth. Father was incarcerated at the time, but Mother had e-mailed Father about the birth and Father was certain Gabriel was his child. Like Mother, Father had a significant history of substance abuse and a diagnosis of schizophrenia, as well as an extensive criminal history. Father reported he began using drugs at age 14 and had used LSD and "everything else under the sun." Father did not know how long he would be in custody and stated he was awaiting a psychological evaluation to see if he was competent

¹ All further statutory references are to the Welfare and Institutions Code.

to stand trial. Father acknowledged Mother suffered from mental illness and was sometimes violent but had no concerns about Mother's ability to care for Gabriel. Father is a registered sex offender and previously lost custody of at least one other child.

The Agency filed a juvenile dependency petition on Gabriel's behalf on October 10, 2017. Gabriel was approximately one week old. The petition alleged Mother and Father were unable to protect Gabriel or provide regular care. The Agency recommended reasonable, supervised visitation for Mother and stated it would assess the appropriateness of visitation for Father if and when his paternity status was confirmed. The juvenile court found the Agency had made a prima facie showing on the petition, detained Gabriel, and ordered liberal supervised visitation and reunification services for Mother.

Father was not present at the detention hearing, so the juvenile court issued an order to produce Father for a special hearing on October 17, 2017. Father did not appear at the October 17 hearing and the juvenile court noted Father had refused to get on the bus from his detention center. Father later claimed he had not refused and was told the court no longer needed him.

Father made his first appearance at a jurisdiction and disposition hearing on November 1, 2017. In a report submitted the same day, the Agency stated it would not be recommending services for Father, pursuant to section 361.5, subdivision (b)(10), (11), and (16), given his previous dependency case, his status as a registered sex offender, and his extensive criminal, mental health, and substance abuse history. However, at the hearing, the Agency requested a continuance so it could comply with the notice

requirements of the Indian Child Welfare Act (ICWA). The court appointed counsel for Father and ordered paternity testing. Father requested visitation, but the court denied the request pending the results of the paternity test.

On December 6, 2017, the court found Father was the biological father of Gabriel but continued the jurisdiction and disposition hearing once again based on ICWA notice requirements. Father made another request for visitation, but the juvenile court denied the request after finding visitation would be detrimental to Gabriel based on the Agency's recommendation to deny Father reunification services, as well as a hepatitis A outbreak at Father's detention facility.

The court held the contested adjudication and disposition hearing on January 3, 2018. Father was not present. Father's attorney asked for a continuance and explained the bailiff indicated Father refused to attend but Father had stated he intended to appear the last time the attorney spoke with him. The court confirmed with the bailiff that the patrol deputy reported Father refused to attend the hearing and denied the continuance.

The Agency recommended services for Mother but argued services for Father would not be in Gabriel's best interests given Father's criminal history, status as a sex offender, and prior failure to reunite with other children. The court sustained the petition based on true findings by clear and convincing evidence and ordered services for Mother. The court noted Father was not custodial but was requesting custody and found, by clear and convincing evidence, it would be detrimental to place Gabriel with Father because of his status as a sex offender and various mental health issues. The court declined to order reunification services for Father after noting the detriment finding and further finding

services for Father would not be in the best interests of Gabriel. A copy of the order, which included a statement of appellate rights, was sent to Father.

Thereafter, Mother visited Gabriel for one hour once a week but had difficulty taking care of him. She also struggled to maintain sobriety and failed to follow through on her case plan. In May, Mother was arrested for domestic violence. Accordingly, at the six-month review hearing on June 27, 2018, the Agency recommended the juvenile court terminate services for Mother and set a section 366.26 hearing.

Father was not present at the June 27 hearing but was represented by counsel. Father had moved to state custody at a substance abuse treatment facility and the parties were uncertain whether he had received notice of the hearing. The court reset the trial date to August 21 and ordered the Agency to re-notice Father at his new address.

Father also was not present on August 21, 2018, but counsel appeared on his behalf. The Agency represented it had re-noticed Father at his new custodial address and the court made a finding that notice had been given. The Agency recommended termination of services for Mother and asked the court to set a section 366.26 hearing. Father's counsel opposed. The court found there was not a substantial probability Gabriel would be united with Mother, terminated her services, and set the section 366.26 hearing for December 12, 2018. The order, which included a statement of appellate rights, was sent to Father.

The court issued an order for Father's appearance at the December 12, 2018 hearing and Father chose to participate by phone. Mother was arrested before the hearing and could not be produced so the court continued the hearing to January 9, 2019.

Thereafter, Father sent the court an e-mail stating he would be released from custody on January 17, 2019 and asked the court to continue the hearing until after that date so he could attend as a "free man." Father acknowledged he had never met Gabriel, but stated he wanted the opportunity to be a father and to play a role in Gabriel's life.

The court did not continue the hearing and Father appeared at the January 9 hearing by phone. Father's counsel requested a trial set on the section 366.26 hearing and informed the court Father expected to file a section 388 petition upon his release from custody requesting visitation with Gabriel. Father was released from prison in January but did not contact the Agency to request visitation with Gabriel and did not return the Agency's telephone calls.

The juvenile court held the section 366.26 hearing on February 26, 2019. The Agency recommended termination of parental rights and a permanent plan of adoption for Gabriel. Father filed his section 388 petition the same day. The petition alleged Father had completed voluntary services while in custody and was now living in a sober living facility, and requested the court reverse its previous orders denying him visitation and reunification services. The court found "[t]here may be a prima facie showing that there's been a change of circumstances" based on Father's release and progress in voluntary services, but ultimately concluded Father had not made a sufficient showing to warrant an evidentiary hearing because rehabilitation in the short period of time remaining was not likely given Father's long history of serious criminal, drug, and mental health issues and, therefore, continuing the case to provide services for Father was not in

Gabriel's best interests. Following a hearing pursuant to section 366.26, the court terminated parental rights for Mother and Father and set a permanent plan for adoption.

DISCUSSION

A. *Relevant Law and Standard of Review*

Pursuant to section 388, a parent may petition the juvenile court to change, modify, or set aside a previous order based on changed circumstances or new evidence. (§ 388, subd. (a).) The petition for modification must contain a "concise statement of any change of circumstance or new evidence that requires changing the [previous] order." (Cal. Rules of Court, rule 5.570(a)(7).) If "it appears that the best interests of the child . . . may be promoted" by the proposed change of orders, the statute directs the juvenile court to order an evidentiary hearing on the petition. (§ 388, subd. (d).) The juvenile court must consider the " 'totality of a child's circumstances' " and may consider the entire factual and procedural history of the case when deciding whether an evidentiary hearing is appropriate. (*In re Vincent M.* (2008) 161 Cal.App.4th 943, 960; *In re Justice P.* (2004) 123 Cal.App.4th 181, 188-189.)

The party filing a section 388 petition has the burden of establishing, by a preponderance of the evidence, that there is new evidence or changed circumstances and that the proposed change would promote the best interests of the child. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.) To trigger the evidentiary hearing requirement, the petitioner must make a prima facie showing of both requirements. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806 (*Zachary G.*)) We construe the petition liberally but, in order to make the requisite prima facie showing, "the allegations of the petition must be

specific regarding the evidence to be presented and must not be conclusory." (*In re Alayah J.* (2017) 9 Cal.App.5th 469, 478; Cal. Rules of Court, rule 5.570(a).)

We review a juvenile court's decision to deny a section 388 petition without an evidentiary hearing for abuse of discretion. (*In re K.L.* (2016) 248 Cal.App.4th 52, 62; *Zachary G., supra*, 77 Cal.App.4th at p. 808.) "The denial of a section 388 motion rarely merits reversal as an abuse of discretion." (*In re Amber M.* (2002) 103 Cal.App.4th 681, 685-586.)

B. The Court Did Not Abuse Its Discretion in Denying the Petition

Here, the trial court acted within its discretion to conclude that Father had not met his burden to establish it would be in Gabriel's best interests to allow Father to receive visitation and reunification services.

Father has had a lifetime of substance abuse dating back to his teen years. Based on his own admission, he started taking drugs at 14 years old and had used LSD and "everything else under the sun." He also has a lengthy criminal history, including multiple probation violations, and is a registered sex offender. He has been diagnosed with schizophrenia, psycho-affective disorder, and post traumatic stress disorder and previously lost parental rights to at least one other child. When Father filed the section 388 petition, Gabriel was over a year old, had never met Father, and was in a stable foster care environment with a family that wished to adopt him.

Despite this lengthy history, Father alleges, in his section 388 petition and now on appeal, that it would be in Gabriel's best interests to allow Father to receive reunification services and visitation because he has "addressed his underlying issues" and is

"reformed." As support, the petition alleged Father successfully completed a substance abuse program and parenting classes while in custody, was released from custody in January 2019, immediately entered a sober living facility under strict conditions of probation, and had since tested negative for drug use. In addition, Father attached correspondence describing the substance abuse treatment group he participated in while in custody, the sober living facility he had moved into, and his compliance with probation for the month following his release. Father's ability to remain sober for approximately one month, while under the supervision of probation and a sober living facility, does not demonstrate a long-term ability to maintain that sobriety. (See *In re Clifton B.* (2000) 81 Cal.App.4th 415, 423-424 [200 days of sobriety not enough to demonstrate long-term sobriety].) Instead, as the juvenile court found, Father's long history of substance abuse and his apparent inability to comply with probation over the course of the past decade suggest a low probability that he will remain sober and out of custody. Further, even assuming Father could maintain his new-found sobriety, the petition does not provide any evidence to address his status as a sex offender or his previously diagnosed mental health conditions.

Father nevertheless asserts he was entitled to an evidentiary hearing, at a minimum, because there was at least a possibility that his proposed change in orders *may* have promoted Gabriel's best interests. However, a section 388 petition must show more than a mere possibility that the requested change would be in the minor's best interests to trigger the evidentiary hearing requirement. (See *In re Jackson W.* (2010) 184 Cal.App.4th 247, 257-258.) The facts alleged must be sufficient, if supported by

evidence given credit at the evidentiary hearing and considering the entire factual and procedural history of the case, to sustain a favorable decision on the petition. (*Ibid.*) Considering the entire history of this case, the allegations in Father's section 388 petition were not sufficient, even if true, to sustain a favorable decision. As discussed, the evidence does not establish Father could maintain his sobriety long term and, even if he could, Father had a host of additional, unaddressed criminal and mental health issues which formed the basis of the juvenile court's findings. Moreover, Gabriel had no relationship with Father but was thriving with caretakers that wanted to adopt him, and given this context, the petition did not offer any evidence suggesting visitation or reunification would be in Gabriel's best interests. (See *Zachary G.*, *supra*, 77 Cal.App.4th at pp. 805-806; *In re Marilyn H.* (1993) 5 Cal.4th 295, 309 [if a parent has failed to reunify in a reasonable period of time, "the child's interest in permanency and stability takes priority"].)

Father asserts he requested visitation with Gabriel from his very first appearance and Gabriel had not met him only because the juvenile court repeatedly denied his requests. However, Father fails to acknowledge the reasons the court denied those requests. Father was incarcerated when Gabriel was born, charged with possession of narcotics and failure to register as a sex offender, and had an extensive criminal, substance abuse, and mental health history. Accordingly, the juvenile court made a finding it would be detrimental to place Gabriel with Father and, based in part on that finding, also found reunification services for Father would not be in Gabriel's best interests. Although Father alleges he did not receive notice of certain orders along the

way, or of his right to appeal those orders, the record indicates he did receive notice but took no steps to appeal.

Finally, while Father acknowledges the emphasis placed on permanency and stability for the minor in this context, he asserts the changes he requested would not disrupt Gabriel's permanence or stability. We disagree. As a permanent plan of adoption requires the termination of the natural parents' legal rights to the child, the juvenile court could not proceed with that plan if Father were granted the reunification services he requested. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 574.)

Accordingly, we agree Father did not make a prima facie showing the proposed change in orders would be in Gabriel's best interests, and therefore conclude the juvenile court did not abuse its discretion by denying Father's section 388 petition.

DISPOSITION

The findings and order are affirmed.

GUERRERO, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.